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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH LEE MCPHERSON,

Defendant and Appellant.

E071409

(Super.Ct.No. RIF085277)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Affirmed.

Kenneth Lee McPherson, in pro. per.; and William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

## I

### INTRODUCTION

In 2004, defendant and appellant Kenneth Lee McPherson was convicted of robbery (Pen. Code, § 211)<sup>1</sup> and assault with a deadly weapon other than a firearm by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). A true finding was also made that defendant had suffered two prior prison terms (§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (c) & (e)(2), 1170.12, subd. (c)(2)). As a result, defendant was sentenced to a total indeterminate term of 25 years to life.

Approximately 14 years later, in 2018, defendant filed a petition for resentencing pursuant to section 1170.18. The trial court denied defendant's petition, finding the offenses were not qualifying felonies. Defendant appeals from the order denying his petition for resentencing. Based on our independent review of the record, we find no error and affirm the judgment.

## II

### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

On January 14, 1999, defendant entered a supermarket and placed a bottle of cologne and two packages of razor blades under his shirt. Defendant purchased an onion, a loaf of bread, and two cans of beer. As he left the store, a loss prevention officer attempted to apprehend defendant in the parking lot. Defendant hit the loss prevention

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The factual background is taken from the probation officer's report.

officer on the head with a plastic shopping bag containing two metal cans of beer causing the victim pain and knocking him to the ground. Defendant subsequently fled the scene on foot. Defendant was arrested 10 months later.

On October 2, 2003, an amended information was filed charging defendant with robbery (§ 211; count 1); assault with a deadly weapon other than a firearm, to wit, beer cans, by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count 2); and petty theft with a prior (§ 666). The amended information also alleged that defendant had suffered two prior prison terms (§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (c) & (e)(2), 1170.12, subd. (c)(2)).

On March 18, 2004, a jury convicted defendant of counts 1 and 2. Count 3 was dismissed. A true finding was made as to the prior enhancement allegations.

On June 22, 2004, the trial court sentenced defendant to an indeterminate term of 25 years to life on count 1 and stayed an indeterminate term of 25 years to life on count 2. The court struck the prior prison term enhancements.

On November 4, 2014, voters enacted Proposition 47, entitled “the Safe Neighborhoods and Schools Act” (Proposition 47). Proposition 47 classifies as misdemeanors certain drug- and theft-related offenses that previously were felonies or “wobblers,” unless they were committed by certain ineligible defendants. (§ 1170.18, subd. (a).) Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person currently serving a felony sentence or a person who has completed his or her sentence, whether by trial or plea, for an offense that is now a

misdemeanor under Proposition 47, may petition before the trial court that entered the judgment of conviction in his or her case to have the felony conviction designated as a misdemeanor. (§ 1170.18, subds. (a) & (f).)

On July 2, 2018, defendant filed a petition for resentencing pursuant to section 1170.126.

On July 5, 2018, defendant filed a petition for resentencing under section 1170.18.

On July 6, 2018, the People filed a response to defendant's section 1170.18 petition, noting robbery and assault with a deadly weapon were not qualifying felonies.

On August 29, 2018, the court denied defendant's section 1170.18 petition on the grounds that defendant's offenses were not qualifying felonies.<sup>3</sup> There is no evidence in the record to suggest that the trial court ruled on defendant's section 1170.126 petition.

On October 1, 2018, defendant filed a timely notice of appeal.

On October 9, 2018, appellate counsel filed an amended notice of appeal from the trial court's order denying defendant's section 1170.18 petition.

### III

### DISCUSSION

After defendant appealed, upon his request, this court appointed counsel to represent him. Upon examination of the record, counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386

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<sup>3</sup> The court's minute order notes that the ruling occurred on August 7, 2018. However, the judge's signature denying the petition was dated August 29, 2018.

U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court to conduct an independent review of the record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In reviewing defendant's seven-page supplemental brief, defendant fails to make arguments relating to the denial of his section 1170.18 petition in this case.

Instead, defendant focuses on unsubstantiated facts relating to the assault conviction, and arguments related to his prior cases and his prior appeal.<sup>4</sup> These arguments are without merit and not relevant to the trial court's order denying his section 1170.18 petition.

An appellate court conducts a review of the entire record to determine whether the record reveals any issues which, if resolved favorably to defendant, would result in reversal or modification of the judgment. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Feggans* (1967) 67 Cal.2d 444, 447-448; *Anders v. California, supra*, 386 U.S. at p. 744; see *People v. Johnson* (1981) 123 Cal.App.3d 106, 109-112.)

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<sup>4</sup> In defendant's prior appeal, case No. E066233, the trial court denied defendant's Proposition 47 petition for reduction of his felony petty theft conviction to a misdemeanor on the ground defendant had a prior violent felony conviction punishable by life imprisonment, which the trial court concluded was a "super strike" under Proposition 47 (§§ 1170.18, 667, subd. (e)(2)(C)(iv)(VIII)). Defendant appealed that order, arguing his prior robbery conviction was not a super strike because a robbery conviction was not subject to a life sentence on its own, even though defendant had received a life sentence for robbery based on the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). Defendant therefore asserted his prior robbery conviction did not bar him from relief under Proposition 47. We agreed and reversed the order denying defendant's petition for reduction of his felony petty theft conviction to a misdemeanor. (See *People v. McPherson* (July 25, 2017, E066233) [nonpub. opn.] )

As previously noted, Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Among the crimes reduced to misdemeanors by Proposition 47, rendering the person convicted of the crime eligible for resentencing, are: shoplifting where the property value does not exceed \$950 (§ 459.5); petty theft, defined as theft of property where the value of the money, labor, real property or personal property taken does not exceed \$950 (§ 490.2); and receiving stolen property where the property value does not exceed \$950 (§ 496). (§ 1170.18, subd. (a).)

In addition, “[o]ne of [the] purposes [of Proposition 47] was to ‘[r]equire misdemeanors instead of felonies for *nonserious, nonviolent crimes* like petty theft and drug possession . . . .’ [Citation.]” (*People v. Pak* (2016) 3 Cal.App.5th 1111, 1120, *italics added*.) Robbery is not a nonserious, nonviolent larceny; rather, “[r]obbery is essentially larceny aggravated by use of force or fear to facilitate the taking of property from the person or presence of the possessor. [Citation.]” (*People v. Smith* (2009) 177 Cal.App.4th 1478, 1489-1490, quoting *In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007-1008.) Indeed, robbery is statutorily defined as a violent felony (§ 667.5, subd. (c)(9)) and as a serious felony (§ 1192.7, subd. (c)(19)). Consequently, defendant’s robbery conviction cannot be treated as a nonviolent, nonserious “shoplifting” and is not an offense eligible for relief under Proposition 47.

Likewise, defendant’s assault with a deadly weapon conviction is not a nonserious, nonviolent felony. Furthermore, section 1170.18 does not list section 245,

subdivision (a)(1), the offense at issue in the present appeal, as one of the code sections amended or added by Proposition 47. (§ 1170.18, subd. (a).) In other words, Proposition 47 left the offense of assault with a deadly weapon other than a firearm unchanged, and that offense is a felony. (§ 245, subd. (a)(1).)

Based on the statutory language of section 1170.18, defendant is ineligible for resentencing as a matter of law. Therefore, the trial court properly denied defendant's section 1170.18 petition. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the entire record for potential error and find no arguable error that would result in a disposition more favorable to defendant.

#### IV

#### DISPOSITION

The order denying defendant's section 1170.18 petition for resentencing is affirmed.

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CODRINGTON

J.

We concur:

RAMIREZ

P. J.

McKINSTER

J.